

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAILCAR MANAGEMENT, LLC,

Plaintiff,

V.

CEDAR AI, INC.; MARIO PONTICELLO; DARIL VILHENA; and YI CHEN,

Defendants,

C21-0437 TSZ

MINUTE ORDER

WABTEC CORPORATION,

Third-Party Defendant.

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) The motion to compel, docket no. 190, brought by defendant Cedar AI, Inc. (“Cedar”), is STRICKEN in part, GRANTED in part, DENIED in part, DEFERRED in part, and RENOTED to August 18, 2023, as explained further below. By Minute Order entered May 18, 2023, docket no. 207, the Court deferred ruling on Cedar’s motion to compel, in which Cedar asked the Court to require plaintiff Railcar Management, LLC (“Railcar”) to produce the communications or documents relating to 103 entries on Railcar’s privilege log. See Kaiser Decl. at ¶ 9 & Ex. G (docket nos. 191 & 195). The Court allowed Cedar to designate up to twenty (20) privilege log entries that it believed related to materials not protected by the attorney-client privilege or the work-product doctrine, and directed Railcar to provide to the Court for *in camera* review the documents associated with the designated log entries. Of the twenty (20) entries identified by Cedar, see Notice (docket no. 209), Railcar conceded that eight (8) involved items as to which the attorney-client privilege and/or the work-product doctrine were/was not appropriately invoked, and those eight (8) items were produced to Cedar. See Exs. B, D, & F–K to Kaiser Decl. (docket no. 241). Railcar also disclosed in redacted form the materials

1 associated with four (4) other privilege log entries, but it has not explained why those
 2 redacted versions could not have been provided before Cedar filed its motion to compel.
 3 *See* Pl.’s Supp. Br. at 7–8 (docket no. 223) (indicating merely that redacted versions of
 4 RMI_PLOG_0038, RMI_PLOG_133, RMI_PLOG_182, and RMI_PLOG_204 have been
 produced). The Court has conducted an *in camera* review of the unredacted versions of
 these four (4) items, as well as of the remaining eight (8) documents on Cedar’s original
 list, and hereby ORDERS as follows.

5 (a) Cedar’s motion to compel, docket no. 190, is STRICKEN as moot
 with regard to the following eight (8) privilege log entries:

- 6 • RMI_PLOG_0001 (Ex. F to Kaiser Decl. (docket no. 241-4))
- 7 • RMI_PLOG_0003 (Ex. G to Kaiser Decl. (docket no. 241-5))
- 8 • RMI_PLOG_0095 (Ex. H to Kaiser Decl. (docket no. 241-6))
- 9 • RMI_PLOG_0108 (Ex. D to Kaiser Decl. (docket no. 241-2))
- 10 • RMI_PLOG_0123 (Ex. I to Kaiser Decl. (docket no. 241-7))
- RMI_PLOG_0125 (Ex. B to Kaiser Decl. (docket no. 241-1))
- RMI_PLOG_0137 (Ex. J to Kaiser Decl. (docket no. 241-8))
- RMI_PLOG_0142 (Ex. K to Kaiser Decl. (docket no. 241-9))

11 Although Railcar should have produced these materials before Cedar filed its
 motion to compel, the Court will not, for purposes of awarding attorney’s fees
 12 and/or costs, treat Cedar as having prevailed on its motion with respect to the
 above-enumerated items.

13 (b) Cedar’s motion to compel, docket no. 190, is GRANTED as to the
 14 following privilege log entries:

- 15 (i) Pages 1–9 of RMI_PLOG_0026¹;
- 16 (ii) RMI_PLOG_0038;

17 ¹ In addition to the first nine pages, which are printouts of an email between two employees of
 18 third-party defendant Wabtec Corporation (“Wabtec”), namely Andrew G. Parker, Senior
 19 Director of Rail Product Solutions, and Quincy Castro, former chief security officer, Item (i)
 20 (RMI_PLOG_0026) contains a 250-page spreadsheet with unlabeled columns that appear to
 21 contain times ranging from 5:23 a.m. through 2:39 p.m. on January 9, 2019, Internet Protocol
 22 addresses, and computer activities. The spreadsheet appears to be the “extract on the CIC TMS
 system called ‘CEDAR AI ONLINE’” that is referenced in Parker’s email to Castro, but absent
 further information about this spreadsheet, the Court will not require that it be disclosed to Cedar
 in unredacted form. The parties shall meet and confer concerning whether the spreadsheet
 contains data that is proprietary to a third party or to Railcar or Wabtec, and if so, whether it may
 be produced in unredacted or redacted form subject to the terms of the Stipulated Protective
 Order, docket no. 79.

- 1 (iii) RMI_PLOG_0074 and RMI_PLOG_0196,²
which appear to be the same document;
- 2 (iv) RMI_PLOG_0167;
- 3 (v) RMI_PLOG_0168;
- 4 (vi) RMI_PLOG_0171; and
- 5 (vii) RMI_PLOG_0172.

6 All of these entries relate to items containing purely factual matter, which is not
 7 shielded by the attorney-client privilege even when transmitted between an
 8 attorney and his or her client. See In re Premera Blue Cross Customer Data Sec.
Breach Litig., 329 F.R.D. 656, 661 (D. Or. 2019) (applying Washington law and
 9 quoting Newman v. Highland Sch. Dist. No. 203, 186 Wn.2d 769, 777–78, 381
 10 P.3d 1188 (2016)); see also Evans v. Raines, 800 F.2d 884, 887 n.4 (9th Cir. 1986)
 11 (“Because the attorney-client relationship is created and controlled by state law,
 12 the nature and extent of the attorney-client privilege is defined by state law.”)
 13 (citing inter alia Baird v. Koerner, 279 F.2d 623, 632 (9th Cir. 1960))). Although
 14 the emails contained in Items (i) and (ii) are marked “Privileged and Confidential /
 15 Attorney-Client Communication,” no lawyer was copied on the emails. Items (iii),
 16 (v), (vi), and (vii) do not identify an author or include a recipient list, and Railcar’s
 17 post hoc representations that the materials were prepared at Wabtec’s attorney’s
 18 direction and/or were presented to in-house or outside legal counsel do not show
 19 that the communications were “made in confidence and in the context of an
 20 attorney-client relationship.” Newman, 186 Wn.2d at 777; see also Youngs v.
PeaceHealth, 179 Wn.2d 645, 653, 316 P.3d 1035 (2014) (“[T]he attorney-client
 21 privilege protects the privileged communications only—not the facts transmitted in
 22 those communications. Facts are proper subjects of investigation and discovery,
 23 even if they are also the subject of privileged communications.”). Item (iv) is a
 24 contract between Wabtec and CrowdStrike Services, Inc. (“CrowdStrike”) titled
 25 “Statement of Work.” Although Wabtec’s lawyer signed the document, the
 26 subject matter of the agreement did not relate to the giving or obtaining of legal
 27 advice. The Statement of Work was prepared for a purpose entirely separate from
 28 Wabtec or Railcar consulting with their attorneys; it operates to bind Wabtec and
 29 CrowdStrike to their respective duties in a business transaction, and the contract
 30 was intended to be seen by persons other than Wabtec and its attorneys, namely,

2 Although Appendix A in RMI_PLOG_0074 and RMI_PLOG_0196 is titled “Legal FAQs,” the
 20 information set forth therein is of a factual nature and therefore not protected by attorney-client
 21 privilege. Moreover, the document contains certain “security recommendations,” which
 22 indicates it was prepared for at least one purpose other than litigation. Because the report
 23 discusses certain Railcar and/or Wabtec clients, Railcar may elect to designate the material as
 24 “Attorney’s Eyes Only” pursuant to the Stipulated Protective Order, docket no. 79.

1 employees or independent contractors of CrowdStrike who would or did conduct
 2 the investigation and needed to understand the scope of their responsibilities. See
In re Premera Blue Cross, 329 F.R.D. at 661 (citing Mechling v. City of Monroe,
 3 152 Wn. App. 830, 853, 222 P.3d 808 (2009)). Railcar also cannot shield these
 4 materials from disclosure by invoking the work-product doctrine; nothing in the
 5 various emails, PowerPoint slides, and formal or informal reports relates to
 6 litigation strategy or the legal theories underlying potential claims or liabilities.
 7 As to Items (iii), (v), (vi), and (vii), which are essentially anonymous and undated,
 8 Railcar cannot establish, for purposes of the work-product doctrine, that, at the
 9 time the items were generated, Railcar unilaterally believed litigation would result.
See In re Rutter's Data Sec. Breach Litig., No. 20-CV-382, 2021 WL 3733137,
 10 at *1–3 (M.D. Pa. July 22, 2021) (ruling that a cybersecurity consultant's
 11 investigative report was not protected by the work-product doctrine); see also
In re Premera Blue Cross, 329 F.R.D. at 664 (“When materials are prepared for a
 12 ‘dual purpose,’ meaning they are not prepared exclusively for litigation, then the
 13 ‘because of’ test applies.” (emphasis added)).³ Railcar’s contention that
 14 everything created during the course of its and CrowdStrike’s investigation is
 15 protected by the work-product doctrine suggests that, before launching the
 16 investigation, Railcar had already decided that it had been injured or damaged and
 17 that Cedar was the culprit, and thus, Railcar’s argument both undermines the
 18 credibility of the materials, which could be viewed as merely reaching a foregone
 19 conclusion, and raises the question of why the reports at issue would not be
 20 subject to disclosure pursuant to Federal Rules of Civil Procedure 26(a)(1), (a)(2),
 21 and/or (a)(3)(A).

22
 23 (c) The Court AWARDS to Cedar as the prevailing party on its motion
 24 to compel \$7,500 in attorney’s fees and costs incurred to date. Railcar shall pay
 25 this amount to Cedar within seven (7) days of the date of this Minute Order.

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(d) Cedar's motion to compel, docket no. 190, is DENIED as to the following materials:

- RMI_PLOG_0133⁴;
- RMI_PLOG_0182⁴;
- RMI_PLOG_0188⁵; and
- RMI_PLOG_0204.⁴

(e) Cedar's motion to compel, docket no. 190, is otherwise DEFERRED and RENOTED to August 18, 2023. Based on the Court's *in camera* review, and Railcar's voluntary disclosures of unredacted and redacted documents associated with privilege log entries, the Court has reason to believe that additional materials withheld by Railcar are not protected by the attorney-client privilege or the work-product doctrine. The Court is not, however, persuaded that either the "special master" solution applied in *Entrata, Inc. v. Yardi Sys., Inc.*, No. 15-cv-102, 2018 WL 4146605 (D. Utah Aug. 30, 2018), or an order requiring Railcar to disclose the remaining items sought by Cedar, both of which Cedar advocates in the alternative, are warranted at this time. Instead, the Court DIRECTS as follows:

(i) On or before 8:00 a.m. on July 14, 2023, Cedar shall file a list designating up to fifteen (15) more privilege log entries that it believes relate to communications or documents not protected by attorney-client privilege or the work-product doctrine;

(ii) On or before 5:00 p.m. on July 21, 2023, Railcar shall indicate whether it will voluntarily disclose any of the designated materials to Cedar, and it shall produce the documents to Cedar in unredacted form;

(iii) For each privilege log entry that Railcar withdraws by providing the document in unredacted form, Cedar may, within two (2) business days, add another log entry to its list, and Railcar shall indicate

⁴ These documents have already been provided in redacted form. A particular phrase was redacted from RMI_PLOG_0133 eight (8) separate times. The Court concludes that deletion of the phrase did not alter the substance of the communication, and that no purpose would be served by requiring Railcar to provide RMI_PLOG_0133 in unredacted form. The omitted portions of RMI_PLOG_0182 and RMI_PLOG_0204 contain emails circulated to Wabtec's in-house counsel Michael Watson.

⁵ RMI_PLOG_0188 includes drafts of customer communications, within emails copied to Watson, and on which Watson commented. Although the final customer communication is not subject to attorney-client privilege, the drafts are protected by attorney-client privilege. *See In re Premera Blue Cross*, 329 F.R.D. at 665–66.

1 within three (3) business days thereafter whether it will voluntarily disclose
2 the designated item in unredacted form; this process shall be repeated until
3 either (A) Cedar's list contains fifteen (15) log entries, or (B) less than
4 fifteen (15) of the original 103 entries remain in dispute;

5 (iv) On or before August 14, 2023, Railcar shall provide to the
6 Court for *in camera* review all materials designated on Cedar's list, and it
7 shall disclose to Cedar all documents that it agreed to voluntarily produce
8 pursuant to Paragraph 1(e)(iii);

9 (v) Contemporaneously with its submission of any documents for
10 *in camera* review, Railcar shall file a supplemental brief, not to exceed ten
11 (10) pages in length, explaining why it believes the *in camera* review items
12 are protected from discovery;

13 (vi) Cedar may file a supplemental reply, not to exceed five (5)
14 pages in length, on or before August 18, 2023;

15 (vii) In light of the guidance provided in this Minute Order, if any
16 documents submitted by August 14, 2023, for *in camera* review, are
17 deemed unprotected and inappropriately withheld, the Court will award the
18 following amounts to Cedar, which will be cumulative:

\$500	for the first item
\$1,000	for the second item
\$1,500	for the third item
\$2,500	for the fourth item
\$5,000	for the fifth or subsequent item

19 (viii) In addition, if more than five documents are found to be
20 improperly withheld, the Court might (A) award additional attorney's fees
21 and costs to Cedar, and (B) direct that all materials, which are associated
22 with the privilege log entries at issue and which have not already been
23 reviewed *in camera*, be produced to Cedar in unredacted form.

24 (2) The Clerk is directed to send a copy of this Minute Order to all counsel of
25 record.

26 Dated this 10th day of July, 2023.

27 Ravi Subramanian
28 Clerk

29 s/Laurie Cuaresma
30 Deputy Clerk